United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7132

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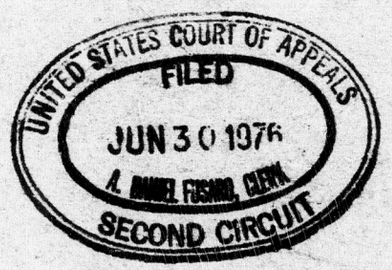
FOR THE SECOND CIRCUIT

DOCKET NO. 76-7132



RICHARD PITTMAN,

Plaintiff-Appellant

EASTERN AIR LINES, INC.,

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

B P/S

BRIEF FOR DEFENDANT-APPELLEE

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June 30, 1976

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BRIEF FOR DEFENDANT-APPELLEE

Statements of Issues Presented for Review

1. Whether the District Court properly found that an Eastern Air Lines-International Association of Machinists and Aerospace Workers System Board of Adjustment's award upholding the termination of the Appellant was rendered in conformity with the time limitations set forth in the collective bargaining agreement between the parties.

2. Whether the District Court exceeded the permissable scope of its review of a System Board award.

STATEMENT OF THE CASE

A. The Nature of the Case and Disposition Below

This case involves an action by Mr. Richard Pittman ("Pittman")

to review and set aside an award of the Eastern Air Lines, Inc. ("Eastern") - International Association of Machinists and Aerospace Workers ("IAMAW") System Board of Adjustment ("System Board") pursuant to the Railway Labor Act (the "Act"), 45 U.S.C. Sections 153 and 184. Mr. Pittman contends in effect that the award was not rendered within the time limits set forth in the collective bargaining agreement - within ten (10) days after the close of the hearing - and that the time limits had not otherwise been extended, as is provided for in the collective bargaining agreement, by mutual agreement of the members of the System Board. The District Court, after consideration of the record, found that the award had been made within ten (10) days of the close of the hearing and dismissed Mr. Pittman's petition to set aside the award. The District Court did not rule on Eastern's contention in its Motion for Summary Judgment that as a matter of law Eastern is entitled to judgment since Mr. Pittman had not made in his Petition any allegations which would bring his claim for relief within the ambit of the limited judicial review authority specifically set forth in the Railway Labor Act.

B. Statement of Facts

Richard Pittman, the Appellant in this proceeding, was employed by Eastern, the Appellee, until May 9, 1975. On that date, Mr. Pittman was discharged for attempted misappropriation of property entrusted to Eastern. Thereafter, Mr. Pittman, through his duly certified collective bargaining agent, the IAMAW, filed a grievance

protesting his discharge and a hearing was held before a System Board on July 17, 1975. The three man System Board was composed of a company member, a union member and a neutral, Mr. Joseph A. Sickles. Mr. Pittman was represented at the hearing by his private counsel and by a union representative (Exhibit B to Eastern's Answer). The neutral member of the Board received the transcript of the Pittman hearing on or about August 11, 1975 (Sickles' affidavit, Exhibit 6 to Eastern's Motion for Summary Judgment) and on August 15, 1975, rendered his award upholding the discharge of Mr. Pittman (Exhibit B to Eastern's Answer).

Article 19(H) of the collective bargaining agreement between Eastern and the IAMAW sets forth the time limitations for the rendering of an award by the System Board. This section provides, in pertinent part, that:

> "The decision of the Board shall be rendered within ten (10) days after the close of the hearing. The time limits specified in this section may be extended by mutual agreement of the Board members." (Exhibit 7 to Eastern's Motion for Summary Judgment; Appendix, p. 7).

The members of the Board by long standing practice have not considered the hearing closed until after the members, including the neutral, receive copies of the transcript of the hearing and the parties have filed Briefs (Exhibit 5, 6 and 8 to Eastern's

Motion for Summary Judgment and unnumbered exhibit attached to Eastern's Reply to Plaintiff's Counsel's Statement).

This practice was confirmed in a letter dated February 3, 1975 from the IAMAW to the panel of neutral System Board members. This letter states, in effect, that the System Board hearing is not considered closed until the date the neutral receives the last document in the case, which may be the transcript of the hearing, and then his decision need be rendered only as "near as feasible" within ten (10) days of that date.[1/] This letter not only affirms the union's understanding of the time at which a System Board hearing is considered closed, but also constitutes an agreement by the union to extend the time limits specified in Article 19(H).

On August 30, 1975, Mr. Pittman filed a Petition in the United States District Court for the Eastern District of New York seeking

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1/ The IAMAW, by letter dated February 3, 1975, citing Article 19(H) of the Eastern IAMAW agreement stated that, "I have explained to my people the delaying actions caused by awaiting transcripts, briefs, depositions ... I know that it is impossible to grant a decision without the necessary documents, but my people have requested me to seek your assistance and if at all possible, to render your decision within ten (10) days of receiving the last document.

"If this portion of the Contract can be adhered to as close as possible by informally regarding this date as the closing of the hearing and then rendering your decision as near as feasible to the ten (10) day limitation, I am sure this would alleviate the situation. Of course, this would in no way have any bearing on interim awards of the expedited cases which are handled under a special procedure." (Exhibit A to Eastern's Answer)

to set aside the System Board's award on the grounds that it had not been made in accordance with the time limitations set forth in the collective bargaining agreement.

Mr. Pittman had not previously raised this objection at the expiration of the ten (10) day period following the date of the System Board hearing.

On September 24, 1975, Eastern filed its Answers and a Motion for Summary Judgment and on September 26, 1975, Mr. Pittman filed a Cross-Motion for Summary Judgment. On December 1, 1975, the Court denied both of these motions. On December 8, 1975, the Court vacated its original order and directed that the neutral member of the System Board, Mr. Sickles, be produced for a hearing on the issue of the date on which he received the transcript of the Pittman hearing. Mr. Sickles was produced for a hearing and, thereafter, on February 9, 1976, the Court issued an order dismissing Mr. Pittman's petition. The Court found that the hearing was not closed until the date on which the neutral member of the Board received the transcript of the hearing and that date was either August 11 or 12, 1975. Since the neutral rendered his award on August 15, 1975, the decision had been made within ten (10) days of the close of the hearing. Subsequently, the Court denied Mr. Pittman's motion for reconsideration of its order finding that the collective bargaining agreement must be interpreted in light of what the record reveals about the past practices and general understanding of the parties.

ARGUMENT

I

The District Court's holding that the System Board's Award was rendered within the time limits set forth in the collective bargaining agreement was correct.

The District Court's finding that the System Board's award was rendered in accordance with the time provisions of the collective bargaining agreement between Eastern and the IAMAW is well grounded on the facts and on the law.

Article 19(H) of the agreement provides that the System Board's award "shall be rendered within ten (10) days after the close of the hearing by mutual agreement of the Board members." There is substantial evidence in the record showing that both Eastern and the IAMAW interpreted the language of this article to mean that the hearing was considered closed as of the date of the neutral's receipt of the last document in the case and that that document may be the transcript. The February 3, 1975 letter from the union to the System Board's panel of neutrals, including Mr. Sickles, states that to be its view (Exhibit A to Eastern's Answer) and the affidavits submitted by Mr. George Martin, the Company Member of the System Board (unnumbered Exhibit attached to Eastern's Reply to Plaintiff's Counsel's Statement) and Mr. D. C. Andrews, Eastern's Director of Industrial Relations (Exhibit 5 to Eastern's Motion for Summary

Judgment) all concur in that understanding. The ten (10) day period does not then begin to run from the date of the hearing but rather from some date thereafter when the relevant documents are received by the neutral and even then the decision need not be rendered within ten days but only "as near as feasible" within a ten day period.

This understanding by all the parties to the agreement of the provisions of Article 19(H) is quite consistent with other sections of the contract. Article 19(M) of the agreement provides that:

> "On the request of either party a complete, official report of all evidence, documents and arguments presented in any case before the Board will be maintained. Arrangements for a Court Reporter for this purpose will be borne equally by both parties." (Exhibit 7 to Eastern's M for Summary Judgment).

Since the contract itself provides for the taking of a transcript of a System Board hearing, it is quite reasonable for the parties to interpret the language in Article 19(H) as meaning that the hearing will be considered closed on the neutral's receipt of the last document which may be the transcript. Here, since it is undisputed that a transcript of the July 17, 1975 hearing was made and sent to all the parties it is evident that they contemplated that the Pittman hearing would not be considered closed at least until the

date the neutral received his copy of the transcript. The fact that none of the parties objected when an award had not been made by July 17, 1975 - ten days after the date of the Pittman hearing - further supports this understanding by the parties.

The District Court found that the neutral member of the System Board received the transcript of the Pittman hearing on either August 11 or August 12, 1975 and that he rendered his award on August 15, 1975. The Court Reporter who is located in New York stated that he had mailed the transcript of the Pittman hearing to all of the parties on either August 7 or August 8, 1975 (Exhibit 1 to Plaintiff's Counsel's Affirmation dated October 15, 1975). The Company member of the System Board who is located in Miami, Florida stated that he received the transcript on August 11, 1975 (Unnumbered Exhibit attached to Eastern's Reply to Plaintiff's Counsel's Statement), while the neutral member whose office is located in Maryland stated that he received his copy of the transcript of the Pittman hearing on or about August 11, 1975 (Exhibit 6 to Eastern's Motion for Summary Judgment).

On the facts, it is clear that the System Board award was rendered within ten (10) days of the close of the Pittman hearing and that the District Court properly interpreted the Union's letter of February 3, 1975 as an expression of the IAMAW's understanding of the meaning of the language of Article 19(H).

The facts in this case are quite different from those in the case cited by Mr. Pittman in his Brief, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Norfolk Southern Ry. Co., 143 F2d 1015 (1944). In that case, the collective bargaining agreement provided that, "...the parties hereto may agree ...upon an extension of such period..." for the Board to render an award. Norfolk Southern, supra. 143 F2d 1015, 1016. The "parties" in that case had not agreed to such an extension and the Court vacated the award. Here, quite to the contrary, the System Board members, who under the collective bargaining agreement are the only persons having a right to extend the time limits, have by a long course of conduct and by the Union letter of February 3, 1975 agreed to extend the time limits of Article 19(H).

In any event, such procedural time limits are usually considered directory rather than mandatory unless the parties specifically provide in the agreement for the automatic invalidation of a late award. c.f. Automobile Transport, Chauffeurs v. Placke Chevrolet Company, Inc. 382 F.Supp 1156, (D.C. Mo. 1974); Local Union 560, International Brotherhood of Teamsters v. Anchor Motor Freight, Inc. 415 F2d, 220, (3rd Cir. 1969); International Brotherhood of Teamsters, Local 145 v. Shapiro, 82 A.2d 345 (1951). Such an invalidating provision must be in "unequivocal language" before a Court will consider setting aside a late award. Placke, supra, 382 F.Supp 1156, 1160. The Eastern-IAMAW contract contains no such language on the automatic invalidation of a late award.

The absence of such "unequivocal language" indicates that the parties intended the time limits to be merely directory, a matter of convenience. Compliance with the time limits does not go to the "essence of the thing to be accomplished." Shapiro, supra, 82 A.2d 345, 350. The Court in Shapiro found that the time limits in the collective bargaining agreement applicable to the rendering of an award related only to procedure. "The language is affirmative in character and such as would naturally be used to secure prompt dispatch of the arbitration. The statute contains nothing which expressly invalidates a belated award or which inferentially makes compliance therewith a condition precedent. The provision is not of the essence of the thing to be accomplished." Shapiro, supra, 82 A.2d, 345, 350.

Indeed mere non-observance of even mandatory time limits, without more, will not invalidate an arbitrator's award. Brotherhood of Sleeping Car Porters v. Pullman Company, 200 F.2d, 160, 164 (7th Cir. 1952). Similarly, even where time is of the essence in rendering an award, the parties may agree to waive the same limits. Pullman, supra., 200 F.2d 160,164.

Thus, the District Court's Order is sound both on the facts and on the law and it should not be set aside.

II

The parties' understanding of the meaning of Article 19(H) does not constitute a modification or amendment to the collective bargaining agreement.

Mr. Pittman's contention that the parties' understanding the meaning of Article 19(H) constitutes a modification or an amendment to the collective bargaining agreement is completely without foundation.

Article 19(H) by its own terms provides that the System Board of members, by mutual agreement, may extend the time limits specified in that section. It cannot then be logically argued that action taken by the Board members pursuant to this section amounts to a modification of the collective bargaining agreement.

Article 30 of the contract, cited by Mr. Pittman in his Brief, has absolutely no relevance to the issues in this matter. Article 30 relates to the notice to be given by either party for the renegotiation of all or some parts of the contract just prior to the contract's expiration date. Article 30 provides, in pertinent part,

> "This entire agreement shall continue in full force and effect through December 31, 1975 and thereafter shall be subject to change as provided for in Section 6, Title 1 of the Railway Labor Act, as amended. Either party requesting

renegotiation of all or any part of this agreement shall serve notice on the other party at least sixty (60) days prior to December 31, 1975." (Appendex, p. A8)

Section 6, Title 1 of the Railway Labor Act (45 U.S.C. 156) provides for the giving of thirty (30) days notice and the last sentence of Article 30 merely extends this notice requirement to sixty (60) days. There is nothing in Article 30 that has any relevance to the issues in this matter.

III

The District Court's review of the decision of the System Board exceeded its permissable scope.

Title II of the Railway Labor Act, 45 U.S.C. Section 184, specifically requires air carriers and their employees, acting through their appropriately designated representatives, to establish system boards of adjustment for the resolution of disputes between an air carrier and its employees over the interpretation and application of the parties collective bargaining agreement.[2/] In interpreting the Act, the United States Supreme Court has said with respect to such system boards that they, "must have exclusive primary jurisdiction",

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2/ 45 U.S.C. 184 imposes upon air carriers the duty to establish System Boards of Adjustment with "jurisdiction not exceeding the jurisdiction which may lawfully be exercised by ...(Railroad) boards of adjustment, under the authority of Section 153 of this title."

Pennsylvania R.R. v. Day, 360 U.S. 568, 552-53 (1959); and that they are mandatory, exclusive and comprehensive system for resolving grievance disputes." Locomotive Engineers v. Louisville and Nashville R. Co., 373 U.S. 33, 38 (1963). Thus, no federal or state court has jurisdiction over the merits of any employment dispute which is properly referrable to a system board of adjustment, Andrews v. Louisville and Nashville R. Co., 406 U.S. 320 (1972), Pennsylvania R. Co. v. Day, supra., at 442-54, Slocum v. Delaware, La. and W.R. Co., 339 U.S. 239 (1950).

It is equally well settled that the findings and orders of a system board of adjustment are final and binding on the parties to the dispute before it. Brotherhood of Railroad Trainman v. Chicago River and Indiana Ry. Co., 353 U.S. 30 (1957); Locomotive Engineers v. Louisville and Nashville R.R. Co., supra., Gunther v. San Diego and Arizona Eastern Ry. Co., 382 U.S. 357 (1965).

The scope of judicial review of airline system board awards is very narrow. Keay v. Eastern Air Lines, Inc., 440 F.2d 667, 668 (1st Cir. 1971); See 45 U.S.C. 184 and 153.[3/]

3/ See Footnote 2, supra and 45 U.S.C. 153(q), provides for very limited judicial review of a system board award: "The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this

(Cont'd. on p. 14)

The Board's award is conclusive as to findings and final and binding on the merits, International Association of Machinists v. Central Airlines, Inc., 372, U.S. 682 (1963) and must be judicially enforced unless "wholly baseless and completely without reason." Gunther v. San Diego and A.E. Ry., supra., at 261; Keay v. Eastern Air Lines, Inc., supra., at 668; Diamond v. Terminal Ry. Alabama State Docks, 421 F.2d 228, 233 (5th Cir. 1970); Brotherhood of Railroad Trainmen v. Central of Georgia Ry., 415 F.2d 403, 411-412 (5th Cir. 1969): Southern Pacific Co. v. Wilson, 378 F.2d 533 (5th Cir. 1967).

It is apparent that Mr. Pittman had not made before the District Court any allegation which would bring his claim for relief within the ambit of the limited judicial review authority of 45 U.S.C. 184 and 153, and Gunther and its progeny: (1) he does not allege any violation of the Railway Labor Act; (2) he does not challenge the award on its merits as not conforming with or confining itself to the System Board's contractual jurisdiction; and (3) he does not allege fraud or corruption by a member of the Board. Mr. Pittman has done nothing more than to collaterally

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3/ chapter, for failure of the order to conform or confine itself, to matters within the scope of the division's juriadiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in Sections 1291 and 1254 of Title 28."

Congress' intent to limit the grounds for judicial review of system board awards to those commonly provided for review of arbitration awards under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), Steelworkers trilogy, 363 U.S. 564, 574, 593 (1960), was made evident when the Act was last amended in 1966. S.R. 1201, 89th Cong., 2d Sess. U.S. Cong. Code and Administrative News 2285, 2286 (1966). Accord: Brotherhood of Railroad Trainmen v. Central of Georgia Ry., 415 F.2d 403 (5th Cir. 1969).

attack the System Board award on the theory that since the award was not rendered within ten (10) days of the hearing date it is a "nullity and invalid" and should be set aside.

The District Court need never have reached any of the factual questions on which it based its Order dismissing Mr. Pittman's petition. The Court properly should have applied, as Eastern urged in its Motion for Summary Judgment, the very narrow federal standards for judicial review of System Board awards and dismissed Mr. Pittman's petition.

Respectfully submitted,

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June 30, 1976

CERTIFICATE OF SERVICE

I hereby certify that I am counsel for Defendant-Appellee, Eastern Air Lines, Inc. and that I have served two copies of the Defendant-Appellee's Brief on the Plaintiff-Appellant by depositing the same in a United States post office, first class mail, postage prepaid, addressed to the counsel of record, Mr. Bernard S. Rogovin, 100 Merrick Road, Rockville Centre, New York 11570.

This 30th day of June, 1976.

Richard P. Magurno

Richard P. Magurno